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Nos. 81-2245, 81-2276 and 82-38

In The

Supreme Court of the United States

October Term, 1982

STATE OF NEVADA,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.
TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF CROSS-PETITIONER PYRAMID LAKE PAIUTE TRIBE OF INDIANS

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ARGUMENT

I.

A Decision Favorable to the Tribe in This Case Will Not Cast Doubt on the Finality of Other Decrees

The principal refrain of our opponents and their supporting amici is, as succinctly put by the Sierra Pacific Power Company (Br. at 15) that "[f]ew, if any, judgments involving the United States would be final if the

Tribe's position is accepted." This Court's decision in *Arizona v. California*, No. 8 Original, (March 30, 1983), graphically demonstrates the fallacy of that contention.

Arizona v. California held that the United States and five Indian Tribes could not reopen the Decree for the purpose of obtaining additional water rights for so-called "omitted lands," *i.e.*, irrigable lands within recognized reservation boundaries for which water rights were not awarded in the earlier litigation. Applying general res judicata principles to the interpretation of Article IX of the Decree, *see* Slip Opinion at 12-13, the Court held that the issue had been fully and fairly litigated between adversaries in the prior trial and that there was no indication of an actual conflict of interest between the water needs of the Tribes and other federal property or of any inadequacy in the government's representation of the Tribes. Slip Op. at 10-11, 15, 16, 18, 19-20, 21-22. This case is strikingly different in all relevant respects.

The first difference is that the Pyramid Lake Tribe's claim to a fishery water right was not fully and fairly litigated between adversaries in *Orr Ditch*. Indeed, it was not litigated at all. PA 189a, 245a; Tribe Res. Br. at 4-11, 18-24.

Second, *Arizona v. California* accords decisive weight to the "fundamental precept" that "questions affecting titles to land, *once decided*, should no longer be considered open." Slip Op. at 13, emphasis added. That principle has no application to this case, however, because there has not been any judicial decision concerning the Tribe's fishery water right. Reliance on a determination that was litigated and resolved must be distinguished from the mere absence of an unlitigated matter from a final decree or decision. *See, e.g., KVOS v. Associated Press*, 299 U.S. 269, 279 (1936).

There is necessarily a large element of uncertainty involved in ascertaining whether claims are duplicative for res judicata purposes. Many different tests have been employed and different standards have evolved over time. *See, e.g., Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U. S. 313, 327 (1971); 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.410[1] at 1157-58 (2d ed. 1982); PA 225a; Nev. Res. Br. at 13-24. Courts and commentators have noted that determining whether a cause of action has been split is "not a matter of precision nor subject to the application of any mechanical formula." *Expert Electric, Inc. v. Levine*, 554 F. 2d 1227, 1234 (2d Cir. 1977), *cert. denied*, 434 U. S. 903. *Accord, Ross v. Internat'l Broth. of Electrical Workers*, 634 F. 2d 453, 458 (9th Cir. 1980); *Abramson v. University of Hawaii*, 594 F. 2d 202, 206 (9th Cir. 1979); 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶0.410[1] at 1154 (2d ed. 1982). *See also, Restatement (Second) of Judgments*, § 24, comment b (1982). Consequently, finality and reliance principles are far less weighty in this case than they were in *Arizona v. California*. *Cf., National Audubon Society v. Superior Court of Alpine County*, 189 Cal. Rptr. 346, 365-66, 369, 658 P. 2d 709, 728-29, 732 (1983) (previous water allocation decision that did not consider environmental and recreational values of Mono Lake must be reconsidered despite Los Angeles' considerable reliance.)

Third, *Arizona v. California* holds that the fact that the government represents Indian as well as other federal property interests in litigation does *not* deprive the resulting decree of finality. Slip Op. at 20-22. There must be evidence of "an actual conflict of interest," *i.e.*, some "basis for the government to believe that Indian water rights and water needs for other *federal* property were in direct competition." *Id.* at 22, emphasis in original. This critical

factor was not present in *Arizona v. California* but is satisfied in the instant case by the District Court's express finding that prior to and during *Orr Ditch* there was a "foreseeable" and "apparent" conflict between the water requirements of the Newlands Project and the Pyramid Lake fishery. PA 165a, 189a. *See also,* PA 204a-05a, 207a-08a; Tribe Res. Br. at 15-17; Brief for the United States at 43; TCID Res. Br. at 15.[1]

In this connection, it is also significant to note that in *Arizona v. California* the United States specifically declined to endorse the Tribes' argument that the government's previous representation of Indian interests was embarrassed by a conflict of interest. Reply Br. of the United States in *Arizona v. California,* No. 8 Original, at 20-21 (June 1982). *See also,* Brief for the United States in this case at 37. Here, by contrast, the government has acknowledged "that the United States' interest in securing water for the Newlands Project [in *Orr Ditch*] substantially conflicted with its trust obligation to the Tribe to obtain water to fulfill the purposes for which the reservation was established, including the preservation of the fishery." United States Br. at 34.

Fourth, over and above the threshold determination that an actual conflict existed, there is an express finding in this case that the conflict adversely affected the government's representation of the Pyramid Lake Tribe's interests. PA 165a-66a ("Faced with this apparent and foreseeable conflict of purposes [between the project's rights and the Indians' rights], the Secretary of the Interior necessarily looked to his delegation of powers from Congress

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[1]Contrary to Nevada's erroneous characterization of the Tribe's position, *e. g.,* Nev. Res. Br. at 5, 7, 32-34 & n. 60, we have never claimed that the government's representation of Indian and other interests, standing alone, constitutes a sufficient basis for reopening a final decree.

[under the Reclamation Act]"); 185a (the government's intention in *Orr Ditch* was to protect the Pyramid Lake fishery only "insofar as it was 'consistent with the larger interests involved in the proposition having to do with the [Newlands Reclamation Project].'" *See also,* PA 189a, 198a, 204a-08a, 245a (government made deliberate decision not to assert fishery water right claim in *Orr Ditch*); Brief for the United States at 16-21, 35-38. *Compare, Cuyler v. Sullivan,* 446 U. S. 335, 348 (1980), and *see* discussion *infra* at 8-9.[2]

Fifth, unlike *Arizona v. California* where the United States had "won what can only be described as a complete victory" for the Tribes, Slip Op. at 10-11, the government's total failure to assert, preserve and defend the Pyramid Lake Tribe's fishery water right in *Orr Ditch* resulted in the exclusion of any water for fish purposes from the Final Decree, the virtual destruction of the once prodigious and world famous Pyramid Lake fishery, and the entire defeat of one of the Reservation's primary purposes. PA 183a-84a, 199a-208a, 211a-12a, 245a; Brief for the United States at 2-3, 35-40.

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[2]Our opponents virtually ignore the lower courts' findings, preferring instead to reargue the evidence as if the case was still before the trial court. Thus, for example, they point to the *Walker River* litigation as evidence that the United States would not have sought a fishery water right even if there had not been any conflict. *E. g.,* Nev. Res. Br. at 36-37; Sierra Pac. Res. Br. at 17-18. But that argument did not convince the District Court, and the Court of Appeals expressly noted the critical differences between the two situations. PA 221a n. 9. In any event, this Court "takes the facts as they are found." German Savings & Loan Society v. Dormitzer, 192 U. S. 125, 129 (1904). *See also,* United States v. Sioux Nation of Indians, 448 U. S. 371, 421 n. 32 (1980). The District Court's undisturbed and unchallenged finding is that the government's representation of the Tribe's fishery interest throughout the *Orr Ditch* litigation was

(Continued on next page)

Thus, the lower courts' findings establish not only the minimum requirement, the existence of an actual conflict, *Arizona v. California, supra,* but also that the conflict resulted in prejudice to the Tribe's interest in obtaining water to preserve its fishery. Further, the prejudice took the most severe form, the total subordination by the federal government of the tribal fishery claim to the water rights claimed by the United States for the Newlands Project. PA 161a-67a, 189a, 204a-08a.[3] And, as a result, the *Orr Ditch* court was not called upon to decide, and in fact

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limited by and subordinated to the "larger interests" of the Reclamation Project. PA 185a.

Nevada mistakenly relies on the District Court's statements that the government's attorneys are not chargeable with an "impermissible conflict" in carrying out the directions of their superiors in the executive branch and that they did not have a "prohibited conflict of interest." *See* PA at 189a-90a, 192a; Nev. Res. Br. at 30, 39-40. These determinations are the product of the District Court's legal conclusions, now conceded to be erroneous, that Congress empowered the Interior Department to extinguish the Tribe's reserved fishery water right for the benefit of the Newlands Reclamation Project. *See* PA 161a-67a, 214a-22a. *Compare,* United States v. Sioux Nation of Indians, 448 U. S. 371, 421 n. 32 (1980). Thus, those conclusions are not only *not* entitled to any deference; for present purposes they are conclusively presumed to be incorrect. *See also,* Brief for the United States at 37-38 n. 30.

In the last analysis, even our opponents are forced to concede that the government's *Orr Ditch* decisions "took into consideration the national goals of the Reclamation Act," TCID Res. Br. at 21, and that the existence of the conflict between the water needs of the fishery and the Newlands Project was "a factor" in the government's decision-making process, at least one of the reasons why a fishery claim was not presented, JA 444, 537-38. *Compare* Nev. Res. Br. at 36-37 (inaccurate characterization of its experts' testimony). In an event, our case is predicated on the lower Courts' findings, not on our opponents' concessions.

[3]By contrast, in Arizona v. California, the United States and the Tribes claimed that the reservations were entitled to increase the amount of their irrigable acreage by between 15% and 22%. Slip Op. at 20.

did not decide, whether the Tribe is entitled to any reserved water right for fishery purposes. PA 189a, 245a. The lower courts' findings make this case of governmental conflict of interest the most compelling that can be imagined.

The line between the facts of this case and those of *Arizona v. California* is clear and bright. Mere representation of multiple governmental interests is not sufficient to overcome the effect of a final decree. There must be more. This case presents much more, an actual conflict, demonstrated prejudice resulting from that conflict in the form of a total, deliberate, failure to assert a meritorious claim, the absence of any judicial consideration or determination of that issue, and absolutely no water to satisfy the Tribe's claimed fishery water right.

The conflict of interest issues in this case and *Arizona v. California* and the differences between the two cases are analogous to the problems posed by an attorney's representation of more than one criminal defendant. Multiple representation of criminal defendants is not *per* se unlawful. *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980). *Compare, Arizona v. California,* Slip. Op. at 21 (government's representation of Indian as well as other federal interests does not deprive decisions of finality). Owing to the possibility of conflict of interest that is inherent in such situations, prior to or during trial a criminal defendant who objects to multiple representation "must have the opportunity to show that *potential* conflicts *imperil* his right to a fair trial." *Cuyler v. Sullivan, supra,* 446 U.S. at 348, emphasis added. *See also, Holloway v. Arkansas,* 435 U.S. 475, 483-87 (1978). *Compare, Arizona v. California,* Slip Op. at 7-9; *Trbovich v. United Mine Workers,* 404 U.S. 528, 538-39 (1972).

A much more severe standard is applied to post-trial efforts to set aside criminal convictions. In such circumstances, "a defendant who raised no objection at trial must demonstrate that an *actual* conflict of interest *adversely affected* his lawyer's performance." *Cuyler v. Sullivan, supra,* 446 U. S. at 348, emphasis added. *See also, Wood v. Georgia,* 450 U. S. 261, 271-72, 273-74 (1981). Similarly, an Indian tribe seeking to reopen a decree in which the United States appeared on its behalf should be required to show that an actual (as opposed to potential) conflict adversely affected (as opposed to imperiled) the government's representation of its interests. *Compare,* Tribe Res. Br. at 36-40.

Neither of these essential conditions was present in *Arizona v. California,* Slip Op. at 21-22, but in this case the lower courts' findings establish the existence of an actual, perceived, conflict between the water needs of the Newlands Project and the Pyramid Lake fishery and the adverse affect of that conflict on the government's performance in *Orr Ditch.* The appropriateness of applying these established principles of criminal procedure to the problems presented by the government's conflict of interest in this civil case is shown by the Court's decisions noting the close connection between the Sixth Amendment's right to counsel and the right to procedural due process secured by the Fifth and Fourteenth Amendments. *See Wood v. Georgia,* 450 U. S. 261, 271-72, 273 (1981); *Glasser v. United States,* 315 U. S. 60, 70 (1942). *See also, Logan v. Zimmerman Brush Co.,* 455 U. S. 422 (1982) (right to procedural due process violated where government's improper conduct results in denial of a full and fair opportunity to be heard and extinguishment of a meritorious cause of action); *Hansberry v. Lee,* 311 U. S. 30, 40, 42 (1940).

The Solicitor General has represented that the circumstances of this case are unique and that the government does not know of any other case in which the United States acted with regard to Indians as it did in the *Orr Ditch* proceedings. Brief for the United States at 35. Neither our opponents nor their supporting amici have pointed to any other instance of remotely similar misconduct. Under these circumstances, there is no reason to suppose that acceptance of the Tribe's position or affirmance of the Court of Appeals' decision against TCID will cast a cloud of uncertainty over the finality of any other existing or future decree. *See also,* PA 252a n. 1 (dissenting opinion of Judge Schroeder); Brief for the United States at 42.[4]

Since *Orr Ditch* did not provide either a full or a fair opportunity to litigate the Tribe's fishery water right and that right was not actually litigated and decided, the Tribe's claim cannot be precluded by operation of res judicata. *Kremer v. Chemical Construction Co.,* 102 S. Ct., 1883, 1897 & n. 22 (majority opinion), 1905 n. 11 (dissenting opinion) (1982); *Logan v. Zimmerman Brush Co.,* 455 U. S. 422, 428-37 (1982). *Arizona v. California* lends further support to that conclusion by clarifying what an Indian tribe must prove in order to establish that its right to procedural due process was denied. The Pyramid Lake Tribe has made that showing.

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[4]There is no merit to the suggestion that the theory advanced by the Tribe in this case could cast a cloud over past or future litigation involving water rights for federal proprietary interests such as national parks, wildlife refuges, national forests, military reservations and the like. No one other than the United States has a due process protected property interest, "a legitimate claim of entitlement," Board of Regents v. Roth, 408 U. S. 564, 577 (1972), in federal property. Consequently, no one else has the requisite interest to claim that it was denied a full and fair opportunity to be heard. *See also,* Tribe Res. Br. at 21-24.

II.

The Tribe Is Entitled To, But Has Not Had, Either Notice or a Meaningful Opportunity To Be Heard

A. Notice.

Nevada argues that the Pyramid Lake Tribe was "fully aware" and "completely cognizant" of the *Orr Ditch* case. Nev. Res. Br. 25-30. No authorities are cited in support of the novel notion that "awareness" and "cognizance" of the existence of litigation are adequate substitutes for the personal notice and service required by the Constitution. Indeed, this Court has expressly held to the contrary. *Schroeder v. City of New York*, 371 U. S. 208, 214 (1962). *See also, Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1, 14-15 & n. 15 (1978); *Wolff v. McDonnell*, 418 U. S. 539, 563-65 (1974).

The purpose of constitutional notice is to inform people or entities that a matter is pending so that they can choose for themselves "whether to appear or default, acquiesce or contest." *Greene v. Lindsey*, 102 S. Ct. 1874, 1877 (1982). *Wolff v. McDonnell*, 418 U. S. at 563-65. *See also, Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1, 13-15 (1978).

It is undisputed that the Pyramid Lake Tribe did not receive any notice that it would be afforded an opportunity to participate in the *Orr Ditch* litigation. 25 Tr. 4704-05, reproduced in App. to Tribe's Cross-Pet. at 1a-2a (defendants' witness); JA 529; 42 Tr. 8553-54, 43 Tr. 8792 reproduced in App. to Tribe's Cross-Pet. at 3a (plaintiffs' witness).[5] The fact that "various people reported back and forth as to the Indians' feelings," Nev. Res. Br. at 26, is totally beside the point in the absence of any evidence

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[5]Significantly, the Tribe made one attempt to hire an attorney prior to 1944, but the government refused to approve the proposed contract. JA 525-28, 550-53. See 25 U. S. C. § 476.

that the Tribe "exercised control" over the *Orr Ditch* litigation. *Cf., Montana v. United States,* 440 U. S. 147, 154-55 (1979).

In addition, there is no evidence that the Tribe was ever informed that its claim to a fishery water right was placed at jeopardy by the *Orr Ditch* proceeding. None of the documents cited by Nevada or any other party provided the Tribe with that essential information. *See* Nev. Res. Br. at 26-28.[6] And all of the communications from or with the Pyramid Lake Tribe or its members cited by Nevada took place many years after the *Orr Ditch* trial. By that time the evidence had been submitted and it was far too late for the Tribe to participate meaningfully in the litigation. *See* Nev. Br. at 27-28; JA 529; PA 179a, 208a.

It is absurd to suggest that the presence of the United States as an *Orr Ditch* party obviated any necessity for providing notice to the Tribe when the government's primary purpose in initiating the *Orr Ditch* litigation was to secure water rights for the Newlands Project. PA 164a. In this setting, the realities of the situation were that the United States was the Tribe's principal adversary with respect to the claim for a fishery water right. PA 165a-67a, 185a, 189a, 205a, 207a; Tribe's Res. Br. at 15-17. *Compare, Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950); *Hansberry v. Lee,* 311 U. S. 32 (1940).

The failure to provide the Tribe with constitutionally adequate notice of the proceedings against it means that the resulting *Orr Ditch* decree cannot be binding on the

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[6]Assuming *arguendo* that the Tribe received proper notice that its irrigation water right was at issue in *Orr Ditch,* that would not be sufficient to provide the requisite notice concerning the fishery water right. Even the skilled government attorneys differentiated between the two claims. PA 206a-07a.

Tribe. *Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1, 13 (1978); *Griffin v. Griffin*, 327 U. S. 220, 228-29, 231 (1946). *See also, Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U. S. 313, 329 (1971).

B. Tribe's Rights to Procedural Due Process.

Our opponents seek to distinguish the principal due process authorities on which the Tribe relies[7] by arguing that the Tribe is not entitled to the same degree of protection as the parties involved in those cases. *See* Nev. Res. Br. at 16, 30-34; TCID Res. Br. at 22-34; Sierra Pacific Res. Br. at 13-14, 46-48. Their principal contention is that the Tribe should be accorded the same treatment as beneficiaries of private trusts,[8] which are not governed by procedural due process constraints. *See, e. g., Lugar v. Edmondson Oil Co.*, 102 S. Ct. 2744 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U. S. 345, 349-50 (1974).[9] They also argue that the Tribe's sole remedy should lie in damages against the government. Sierra Pac. Res. Br. at 40; TCID Res. Br. at 31-34. These arguments are based on fundamental misunderstandings of the role, function, and purpose of procedural due process.

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[7]Logan v. Zimmerman Brush Co., 455 U. S. 422 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950); and Hansberry v. Lee, 311 U. S. 32 (1940).

[8]Of course, Mullane v. Central Hanover Bank & Trust Co., *supra*, was concerned with the relationship between private trustees and their beneficiaries.

[9]Judicial involvement in litigation involving private trusts may well import procedural due process constraints into the relationships between private trustees and their beneficiaries. *See* Kremer v. Chemical Construction Co., 102 S. Ct. 1883, 1897 n. 22 (majority opinion), 1905 n. 11 (dissenting opinion) (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950); Griffin v. Griffin, 327 U. S. 220, 228-29, 231 (1946). But see *infra* at n. 10. In any event, even a private beneficiary is entitled to the return of property that the trustee itself wrongfully acquired. *See* Shaw v. Railroad Co., 100 U. S. 605, 613 (1879); Brief for the United States at 24-33, 41-42, 46-47.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U. S. 539, 558 (1974). The "essential dichotomy" set forth in the Fifth and Fourteenth Amendments is between deprivation of life, liberty, or property by the state and federal governments and private conduct, however discriminatory or wrongful, against which those Amendments offer no shield. *Jackson v. Metropolitan Edison Co., supra*, 419 U. S. at 349. *See and compare, Jackson, supra*, with *Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1 (1978). The purpose of due process is "to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." *Carey v. Piphus*, 435 U. S. 247, 259 (1978). Due process rules are shaped and designed to minimize the risk of error in the truth-finding process and to convey a feeling that the government has dealt fairly with people. They are "absolute" in the sense that they do not depend upon the merits of a claimant's substantive assertions because of the importance to organized society that procedural due process be observed. *Carey, supra*, 435 U. S. at 259, 262, 266. *See also, Hughes v. Rowe*, 449 U. S. 5, 13-14 n. 12 (1980) (per curiam). Hence, a violation of procedural due process necessarily gives rise to declaratory and injunctive remedies designed to correct both unfair governmental decision-making procedures and their effects. *See Hughes v. Rowe*, 449 U. S. 5, 13-14 n. 12 (1980) (per curiam); *Marshall v. Jerrico, Inc.*, 446 U. S. 238, 242 (1980); *Memphis Light, Gas & Water Division v. Craft*, 436 U. S. 1, 13-19 (1978); *Carey v. Piphus, supra; Morrissey v. Brewer*, 408 U. S. 471, 485-89 (1972); *Goldberg v. Kelly*, 397 U. S. 254, 266-71 (1970). To the extent

that a damage remedy may be available, it is decidedly secondary. *Carey v. Piphus, supra,* 435 U. S. at 259-65.[10]

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[10]This Court long ago held that due process applies to the relations between Indians and the federal government. Duncan Townsite Co. v. Lane, 245 U. S. 308, 310 (1917); United States ex rel. Turner v. Fisher, 222 U. S. 204 (1911). *See also,* Pence v. Kleppe, 529 F. 2d 135, 140-41 (9th Cir. 1975); PA 231a-33a. Nothing in Heckman v. United States, 224 U. S. 413 (1912), suggests that Indians are entitled to less due process protection than other Americans. *See* PA 236a-37a n. 18. Other cases, such as Santa Clara Pueblo v. Martinez, 436 U. S. 49, 70 n. 30 (1978), and Morton v. Ruiz, 415 U. S. 199, 232, 236 (1974), subject Indian affairs to even higher standards owing to the government's "overriding duty to deal fairly with Indians." *See also,* Seminole Nation v. United States, 316 U. S. 288, 297 (1942); Davis, "Administrative Law Surprises in the *Ruiz* Case," 75 Colum. L. Rev. 823, 843 (1975); Tribe Res. Br. at 34-38.

Applying the rule of Hansberry v. Lee, 311 U. S. 32 (1940) to the relationship between Indians and the federal government makes sense for other legal and practical reasons. Class actions are "an invention of equity," Hansberry v. Lee, *supra,* 311 U. S. at 41, in which "[i]n a very real sense, [the judge] is the guardian of the interests of the absentees." 3B J. Moore and J. Kennedy, *Moore's Federal Practice* ¶ 23.70 (2d ed. 1982). Consequently, both class actions and representation of nonparties' interests by government attorneys directly implicate the due process constraints of the Fifth and Fourteenth Amendments against state and federal action. In addition, class representatives are subject to open and public scrutiny by courts and parties to insure that they "will fairly and adequately protect the interests of the class." Rule 23 (a), Fed. R. Civ. P. Similarly, the multiple and at times conflicting interests served by government attorneys are matters of public record, knowledge of which is charegable to opposing litigants. Schweiker v. Hansen, 450 U. S. 785 (1981), *reaffirming* Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380, 384-85 (1947). In this case, for example, the government's actual representation of the interests of both the Pyramid Lake Reservation and the Newlands Reclamation Project was apparent, on the face of the *Orr Ditch* Amended Complaint, PA 2a-11a, and the government's conflicting legal responsibilities to the Tribe and to the Newlands Project water users are based on public laws and are manifested in judicial decisions. *See* 25 U. S. C. § 175; Heckman v. United States, 224 U. S. 413 (1912); Winters v. United States, 207 U. S. 564 (1908); 43 U. S. C. §§ 372, 419, 461, 498; Ickes v.

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The principles and their application to this case are illustrated by *Logan v. Zimmerman Brush Co.*, 455 U. S. 422 (1982), which we previously described as controlling. *See* Tribe Cross-pet. Br. at 41-43. In *Logan*, an employee's cause of action against a private company was extinguished as a result of an "established state procedure that destroy[ed] his entitlement without affording him proper procedural safeguards." 455 U. S. at 436. The private company, like the defendants in this case, profited from the unconstitutional state action, but were not responsible for the wrongdoing. The Court held that the remedy for the denial of procedural due process was reinstatement of the employee's cause of action against the company. It specifically rejected the company's claim that the sole remedy should be a tort action for damages against the state. 455 U. S. at 435-37. *See also, Hansberry v. Lee*, 311 U. S. 32 (1940).[11]

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Fox, 300 U. S. 82, 94-95 (1937). By contrast, in the case of banks, insurance companies and other private fiduciaries, it would be virtually impossible for a court or an opposing party to ascertain the full range of the representative's own interests and those of all of its beneficiaries that could conceivably conflict with its responsibility to a particular beneficiary in a specific suit. More fundamentally, there is no conceivable justification for exempting Indians from the essential right to procedural due process accorded all other Americans in their dealings with the federal government. *See* Tribe Res. Br. at 34-38.

[11]Nevada's reliance on Yankton Sioux Tribe of Indians v. United States, 272 U. S. 351 (1926), and United States v. Creek Nation, 295 U. S. 103 (1935) (Br. at 47) is misplaced. Those cases did not involve any claimed violations of procedural due process and they are predicated on either a congressional taking *(Yankton Sioux)* or congressional confirmation of previously unauthorized executive actions *(Creek Nation)*. *See* United States v. Goltra, 312 U. S. 203, 208-09 (1941). In the instant case, the Court of Appeals expressly held that Congress has not taken the Tribe's fishery water right or ratified the government's actions in the *Orr Ditch* case, PA 214a-22a, 246a-47a, and those arguments have not been renewed.

In short, when governmental action results in a denial of procedural due process, the ordinary remedy is to do it over the right way in order to achieve the fundamental purpose underlying procedural due process, prevention of mistaken or unjustified deprivation of life, liberty, or property. As we now proceed to show, there is no justification for a departure in this case.

C. Post-Deprivation Damage Remedy.

There is one exception to remedying the denial of procedural due process by reinstatement of the original claim for determination under proper procedures. There are some limited occasions when "either the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process." *Parratt v. Taylor,* 451 U. S. 527, 539 (1981). *See Fuentes v. Shevin,* 407 U. S. 67, 81-82, 90 (1972). Even when these criteria are satisfied, a subsequent tort remedy is not constitutionally adequate unless the complainant can be made "entirely whole." *Logan v. Zimmerman Brush Co., supra,* 455 U. S. at 436-37.[12]

In the instant case, none of these factors are present. There was never any necessity of quick action; the *Orr Ditch* litigation lasted thirty-one years. Nor is there any claim that it was impractical to provide any meaningful pre-deprivation process. The Tribe's right to procedural due process easily could have been satisfied simply by providing the Tribe with notice and an opportunity to be

[12] *Logan* held that the post-deprivation tort remedy would not be adequate because, *inter alia,* it would not provide for the complainant's reinstatement to his prior job.

heard,[13] or by joining TCID and/or the Newlands Project farmers as defendants so that the United States would have been free to advocate the interests of the Tribe against the Project without conflict. *Compare, e. g., Fuentes v. Shevin*, 407 U. S. 67, 90-93 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 339 (1969). *See* Tribe Cross-Pet. Br. at 30 n. 17. And there was no meaningful means by which the propriety of the government's action could have been assessed. The only mechanism suggested by our opponents, a suit for damages against the United States under the Indian Claims Commission Act of 1946, 25 U. S. C. §§ 70 *et seq.*, was not even created until two years after the entry of the *Orr Ditch* Final Decree. *See* PA 233a n. 15. Prior to that time, special jurisdictional acts were necessary in order for courts to entertain damage suits by tribes against the United States. *See* H. R. Rept. No. 1466, 79th Cong., 1st Sess. 2 (1945).[14] And, of course, a damage remedy could never make the Tribe "entirely whole" since: (i) the loss of the threatened Lahontan cutthroat trout and endangered cui-ui would be "incalculable," *TVA v. Hill*, 437 U. S. 153, 172-79, 186, 187-88 1978); (ii) there is "no means of measuring the [enormous] value of [a restored] Pyramid Lake," PA 238a; and

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[13]Notwithstanding its sovereign immunity, the Pyramid Lake Tribe could have been sued by the United States. *See, e. g.*, United States v. Winnebago Tribe of Indians, 542 F. 2d 1002 (8th Cir. 1976); United States v. Blackfeet Tribe, 364 F. Supp. 192, 369 F. Supp. 562 (D. Mont. 1973). *Cf.*, Arizona v. California, *supra*, Slip Op. at 7; United States v. Minnesota, 270 U. S. 181, 194-95 (1926); United States v. Texas, 143 U. S. 621, 642-46 (1892) (states are subject to suit by the United States).

[14]The Indian Claims Commission Act does not purport to authorize the extinguishment of Indian property rights against third parties or to convert existing tribal claims to real property into tort and damage claims against the United States. *See*, Holcomb v. Confederated Tribes of Umatilla Indian Reserva-

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(iii) at best damages are an extremely poor and "speculative" substitute for the tribal economic development and jobs that would be created by a thriving trophy fishery. *See Logan, supra*, 455 U. S. at 436-37; Tribe's Res. Br. at 48-49.[15]

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tion, 382 F. 2d 1013, 1014 (9th Cir. 1967) Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 531 n. 9 (N. D. N. Y. 1977). Even if the statute authorized such extinguishments or conversions by the United States or the Indian Claims Commission, those entities specifically declined to exercise such powers when the Tribe was awarded compensation "for damages suffered as the result of [the Tribe's] not having received all of the water to which it was entitled." PA 210a.

While damages are not an appropriate remedy for the denial of procedural due process, they would be available to compensate TCID if the outcome of this case causes the United States to breach its contractual obligations to either TCID or Newlands Project farmers. *See*, PA 245a-46a. Damages are the traditional form of relief for such violations. *See* Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 702-05 & n. 27 (1949). To the extent that Ickes v. Fox, 300 U. S. 83 (1937), points in the opposite direction, it was overruled by *Larson*. *See*, 337 U. S. at 702 n. 26. As refined and explained in *Larson*, *Ickes v. Fox* allows suits for specific performance of reclamation contracts only when their breach would exceed the Secretary's powers. In this case, there is no longer any claim that recognizing the Tribe's prior and paramount fishery water right is inconsistent with the Reclamation Act.

[15]Arizona v. California, *supra*, is not to the contrary because there was an express holding in that case that the Tribe's right to a full and fair opportunity to be heard had not been violated. *See* Slip Op. at 15, 20-2 & nn. 20, 21. *Compare* United States v. Mitchell, 445 U. S. 535 (1980); United States v. Mason, 412 U. S. 391 (1973). There is a crucial difference between negligent representation on the one hand and unauthorized and unconstitutional conduct on the other, and this difference has a critical bearing on the adequacy and sufficiency of damage remedies. *See* Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682 (1949). This case, unlike Arizona v. California, is governed by this Court's decisions rejecting post-deprivation tort remedies for procedural due process violations in all but the most unusual and exceptional circumstances which clearly are not present here.

D. Possibility of Intervention.

The possibility of the Tribe's intervention in *Orr Ditch*, however real or remote, is irrelevant for four reasons.

First, even fully competent non-parties with constitutionally adequate notice of the proceedings who choose not to intervene are not bound by the resulting judgment. *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S. 100, 108-12 (1969); *Western Union Telegraph Co. v. Forster*, 247 U. S. 105, 115 (1918).

Second, the Tribe is not and was not an ordinary potential intervenor. It is "in a state of dependency," *United States v. Rickert* 188 U. S. 432, 442-43 (1903), "dependent [on the United States] for [its] political rights," *United States v. Kagama*, 118 U. S. 375, 383-84 (1886), and for "protection against the selfishness of others and [its] own improvidence," *Board of County Commissioners v. Seber*, 318 U. S. 705, 715 (1943). *See also, Tiger v. Western Investment Co.*, 221 U. S. 286, 310 (1911); *Oneida Indian Nation v. County of Oneida*, 414 U. S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F. 2d 370, 380 n. 122 (1st Cir. 1975). *Cf. Ewert v. Bluejacket*, 259 U. S. 129, 138 (1922).

Third, the Tribe's sovereign immunity from suit[16] precludes it from being bound because it did not intervene. Tribes cannot be bound by the outcome of litigation which they are privileged to avoid, nor can they be penalized for exercising that privilege. Sovereign immunity cannot so easily be circumvented. *Santa Clara, supra*, 436 U. S. at 58-9; *United States Fidelity, supra*, 309 U. S. at 513.

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[16] *See e. g.*, Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58-59 (1978); United States v. United States Fidelity & Guarantee Co., 309 U. S. 506, 512-13 (1940); *supra* at 20 n. 13.

CONCLUSION

"[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U. S. 35, 47 (1975). "[T]he achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of res judicata." *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U. S. 313, 325 (1971). To prevent manifest unfairness and to achieve substantial justice, this case should be remanded back to the District Court so that the Pyramid Lake Tribe can, at long last, be granted a full and fair opportunity to be heard. The judgment of the Court of Appeals should be reversed insofar as it upholds the res judicata defense of the *Orr Ditch* parties, their successors in interest, and subsequent appropriators of Truckee River water.

Respectfully submitted,

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